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ABSTRACT

This document presents a discussion and projections of future involvement of higher education in the courts. Seven major hypotheses are discussed in detail that will either dissuade or encourage academic court litigation. These are: (1) Colleges and universities will turn increasingly to the courts for protection against hostile external pressures and intruisons. (2) Historically excluded constituencies will increasingly seek the aid of courts to gain access to campus decisionmaking. (3) Criteria that restrict access to higher education will be increasingly challenged and will be sustained only to the extent they reflect valid educational interests. (4) The financial plight of higher education will increasingly invite litigation over the allocation of resources. (5) As state aid to independent colleges and universities increases, the constitutional distinction between public and private higher education will diminish. (6) The spread of faculty collective bargaining will reduce litigation by faculty but may increase litigation against faculty. (7) The high tangible and intangible costs of litigation will tend to deter resort to the courts by all parties, while the impact of each court decision will widen and the prospect of suit will accordingly shape conduct on the campus. (HS)

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THE COLLEGES AND THE COURTS --
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Most of what we now describe as "law of higher education" was promulgated in a period of crisis. The vast majority of recent court decisions involving colleges and universities grew out of dismissal or suspension of students for campus protest activities. These cases deal with occupation of buildings, breaking of windows, blocking of entrances, disruption of ROTC ceremonies, and similar confrontations between students and administration. Many of these decisions define (in considerable detail) the procedures that must be followed in punishing student transgressors; other cases define the range of student conduct protected by the First Amendment. On any given issue of legal or practical significance to student discipline, one can now find ample precedent.

This burgeoning body of law has remarkably little to do with the primary functions of American higher education. In normal times -- which the late 1960's concededly were not -- even student personnel administrators devote a small fraction of their time to student misconduct. Yet because the courts were opened to student pleas shortly before the vast wave of expulsions and suspensions, judicial dockets suddenly became crowded with campus litigation. In a few courts (notably the Western Federal District of Wisconsin in which Madison

resides), the eruption of student discipline cases in the late 60's nearly preempted all regular judicial business. Thus it is at least understandable how five percent of the normal activity of higher education accounted for perhaps two-thirds of the law of higher education during this formative period. Yet the imbalance is perplexing to the university administrator who must conform to the law in his routine as well as his crisis work.

It is now high time to broaden our perspective on the relations between court and campus. The student discipline cases may not quite have run their course -- a few important issues remain sub judice -- but the era that precipitated this caseload has apparently ended. What is now needed is a set of hypotheses about the future of law and higher education in the United States. This paper offers just such projections, qualified as they must be by the obvious limitations of foresight and the imperfections of broad generalization within a diverse and rapidly changing system.

These projections yield no clear or simple answer to the question one might appropriately ask -- Will the courts be more or less involved in higher education during the next decade? There are, in fact, cross-currents and counter-pressures within the projections. On the one hand, resort to the courts will very likely increase as colleges and universities seek new sources of protection against external interference and pressure; and as historically excluded groups assert more vigorously their claims to participate in academic decision-making. Moreover, any departures from neutrality in admissions and employment policies are likely to be challenged in court under an increasingly strict standard of review. In certain ways, too, the mounting fiscal crisis of higher education may create new incentives for litigation. On the other hand, the impact of faculty collective bargaining may reduce resort to the courts. The decline of student activism is almost certain to have the same

effect. Perhaps the greatest deterrent to litigation will be the growing awareness of the heavy costs, both tangible and intangible, of taking academic disputes to court. The readier availability of legal services -- to faculty groups, to student organizations, to campus administrators -- will reinforce this caution since lawyers know far better than laymen that one litigates only as a last resort. Taking all these elements into account, it becomes difficult if not impossible to predict which way the law of higher education will move in the decade ahead. Let us examine each hypothesis in turn.

1. Colleges and universities will turn increasingly to the courts for protection against hostile external pressures and intrusions.

This is not the place to develop the premise from which this projection derives -- that the autonomy of academic institutions is threatened from myriad external forces. Enough has been reported about repressive legislation, grand jury investigations, hostile governing boards, insensitive administrative agencies and the like to reveal a disturbing trend. Our concern is how the colleges and universities will respond to these pressures and the role that law may play in their response.

There are several striking examples of the potential usefulness of protective litigation. When the Michigan legislature attached a host of conditions to the 1970 higher education budget -- setting faculty workloads, reordering admissions policies and constructing campus fiscal autonomy -- the governing boards of the three major universities (Michigan, Michigan State and Wayne) brought suit in the state courts challenging the lawmakers' authority. Supportive precedent was more fully developed in Michigan than other states; twice in the early twentieth century public governing boards had taken the legislature to court and had prevailed. Once again -- unless the state supreme court upsets the judgment of the lower courts -- it appears that the Michigan

courts have vindicated the universities and rebuked the legislature for infringing the autonomy given by the state constitution to higher education.

Several other examples of protective lawsuits might be mentioned. When the Pennsylvania legislature tried to get colleges throughout the world to report every major crime or campus offense committed by any Pennsylvania student, Haverford College and several other institutions brought suit to strike down the law. They were joined as "friends of the court" by 41 other colleges and universities -- both public and private, from all parts of the United States. The three-judge court did invalidate the most offensive provisions of the law on federal constitutional grounds.

The University of California may never have sued the legislature, but its alter ego -- the Golden Bear Athletic Fund -- did recently obtain a state court injunction against certain practices and procedures of the National Collegiate Athletic Association. While the victory may have been somewhat pyrrhic (judging by Berkeley's recent and more serious troubles with NCAA), the judgment did apparently increase the accountability of this vastly powerful, if wholly private, regulatory body.

Less successful have been suits by colleges against the regional accrediting associations -- a challenge by Parsons College to the North Central Association in the mid-60's and a later suit by Marjorie Webster College seeking admission (despite its proprietary character) to the Middle States Association.

It now seems likely that colleges and universities will increasingly seek judicial review of a host of statutes, administrative regulations, exclusionary decisions and even expulsions from private organizations. This is a new prospect for most academic administrators, to whom the courts were largely irrelevant until the mid-60's and then became places where one was called to

account for a student dismissal. The judicial process does work both ways, however, and yesterday's defendant often becomes today's plaintiff.

2. Historically excluded constituencies will increasingly seek the aid of courts to gain access to campus decision-making.

A second emergent trend is the use of courts as a means to participation. To some extent the student protests of the late 60's did open up university decision-making for groups (particularly students) who had little stake in the process throughout most of the history of higher education. For other groups, however, resort to the courts may provide comparable access with less bloodshed. Two recent cases may mark the trend. Nearly three years ago a group of graduate students and teaching assistants at the University of Wisconsin at Madison asked the senior faculty in the English Department to let them attend departmental meetings. When the request was refused, the students went to court, claiming that state law required departmental deliberations to be open to the public. Since the legal issue was doubtful, the judge ordered the department to hold one public meeting to set future policies on access. The senior faculty thereupon decided to open all future meetings, thus mooting the lawsuit. The Department may well have gone further than the court was prepared to compel it to go.

More recently a black community organization in North Philadelphia brought suit in federal court claiming they had been improperly excluded from policy decisions of the Temple University Mental Health Clinic, a community service of the College of Medicine. The court ultimately denied them the relief they sought, but indicated that claims to participation might be litigated in the future with different results if a clearer statutory or constitutional claim could be invoked.

One need only consider the range of excluded groups to measure the potential of litigation -- not only students and community organizations, but alumni, nonacademic staff members, and emeriti faculty, all of whom have substantial interests not fully reflected in existing governance arrangements. There are important limitations, of course; no court is likely to honor an abstract claim to participate unless it is based upon some legal guarantee such as a state "open meeting" law or a federal "maximum feasible participation" requirement. Such statutory backing is, however, not hard to find and seems to be increasingly plentiful -- as witness the current solitude of Congress for student and community participation (e.g., Section 1202) in the governance of higher education.

3. Criteria which restrict access to higher education will be increasingly challenged and will be sustained only to the extent they reflect valid educational interests.

To date most legal challenges to access policies have focused upon exclusion of black students from predominantly white institutions and of women from predominantly male institutions. (Although a few public all-female colleges exist, there appears to have been no reverse litigation by male students.) In these areas, the answers are now relatively clear -- the former as a result of litigation (save for the still unsettled status of dual black-white public systems); the latter, by recent Congressional delineation of the limits of coeducation.

The hard question that remains in the racial area, of course, is that of preferential admissions or "reverse discrimination". As the academic world awaits the outcome of Marco DeFunis' suit against the University of Washington, it is well to place the problem in context. On the one hand, a university that

preferentially admits minority students must assert something stronger than an altruistic desire to help the poor and disadvantaged. On the other hand, it will not do for courts to invoke (as did the Superior court in the DeFunis case) the bare principle that the constitution is color blind and that any race-conscious distinction is therefore invalid. Instead, the validity of preferential programs -- either for admission of students or for hiring of faculty and staff -- should turn upon a demonstration of educationally valid reasons for varying or broadening the traditional selection criteria. Such reasons might include doubts about the reliability and fairness of standardized performance predictors. The university's desire to overcome the effects of past discrimination against minorities might also be relevant. A professional commitment to make faculties and student bodies ethnically more representative of the national population should be persuasive. Or the university might feel compelled to prepare minority and disadvantaged persons to fill vital public service roles that white or Anglo graduates cannot effectively assume. These and other possible desiderata may justify departures from traditional employment or admission criteria -- even when those departures are race-conscious or reflect ethnic differences. Of course it is too early to tell which way the courts will go in this sensitive and volatile area. Whatever the Washington Supreme Court decides about DeFunis, however, we must remember that Olympia is not Olympus.

If the question of race and admissions may be with us for some time, it is likely that distinctions based upon geography will soon cease to have much meaning. Repeatedly the courts have rejected constitutional challenges to nonresident tuition and gradepoint differentials. These precedents are not likely to be overturned. What is quite likely, however, is a Supreme Court decision in the Connecticut case that students who establish local residence

for one purpose (e.g., voting) must be treated as residents of the state for all other purposes (e.g., tuition and fees). Thus, only those students unlucky or homesick enough not to register to vote where they attend college would continue to pay the higher nonresident fees -- and even they might be exempted by proof of eligibility to register, whether or not they actually take that step. There are grounds on which tuition-residence might legally be distinguished from voting-residence and other manifestations of domicile, but the distinction seems tenuous. Moreover, such a distinction would not in any event seem to reflect an educationally valid institutional interest, whatever fiscal basis it might hae.

The more difficult constitutional questions lie a bit further down the road. If and when the present tuition and fee structure is rendered meaningless, most public institutions will seek alternatives by which to avert financial disaster and political disfavor. The likeliest option would be some form of subsidy or tuition remission payable to students who graduated from high schools within the state, or whose parents resided in the state and/or paid taxes there for a requisite period. Superficially, such devices might seem as questionable as the distinctions they would replace. The courts have always recognized a constitutional difference, however, between barriers or obstacles impeding the out-of-stater and subsidies or preferences favoring the in-stater. The problem here will be the practical one of identifying the object of preference once all students become "residents" in the eyes of the law. Much thought and attention will undoubtedly be devoted to these questions even before the Supreme Court speaks, for the impact of a decision favorable to the Connecticut students could be sudden and drastic for all of public higher education.

Whatever may happen with preferential admissions and nonresident tuition, restrictions on access to benefits of higher education are likely to be judged

increasingly in terms of educationally valid interests. Take, as a further example, the raft of cases seeking campus recognition for homosexual or Gay Liberation groups. Some public agencies and institutions may constitutionally be able to deny certain benefits to homosexuals; several federal cases have so held with regard, for example, to security clearances and other sensitive benefits. But the needs and interests of a university are different -- as trial courts in California, Oklahoma and Georgia have recently held -- so that the distinction between heterosexual and homosexual groups is hard to defend. (It may be a different matter, of course, if the charter openly urges violation of valid state criminal laws, but that is not the typical situation.) The question to be asked in such a case is whether some uniquely educational or academic interest of an institution of higher learning justifies such a restriction or distinction.

4. The financial plight of higher education will increasingly invite litigation over the allocation of resources.

Let us assume, as all indicators warn, that the current austerity of American higher education will persist for some time. There is already some evidence that courts will become involved in what are really disputes about the allocation of financial resources. Recent suits, for example, to compel disclosure of budgets and faculty and administrative salaries really reflect this impetus; in good times the plaintiffs would be less anxious to see and the defendants probably less anxious to withhold financial data that have been the subject of these suits.

Although there is no evidence yet of litigation about resources between individual members of the academic community, there are a few inter-unit controversies. There has been an interesting battle in the federal courts

over the allocation formula between the two-year and baccalaureate units in the City University of New York -- resolved, albeit inconclusively, in favor of the present formula or perhaps simply against judicial intervention. Another recent CUNY case -- the unsuccessful challenge by the faculty union to the legislative moratorium on sabbatical leaves -- also reflects an inclination to litigation resource allocation questions.

Most interesting in this regard is a suit recently filed by the faculty of a small two-year college in Southern Washington. The suit challenges the authority of the system-wide governing board to override an agreement negotiated with the local board for a salary increase higher than the state board had allowed. The system board apparently claims the lower rate is required by the level of state appropriations; the faculty claim that the local board should be allowed to use local funds for a larger increase if it so chooses. The case implicates not only the specific financial questions; much more important, it uses fiscal issues as a way of testing local autonomy and the whole set of relations between system and campus administration.

As the financial plight of American colleges and universities worsens, resort to the courts on fiscal matters is likely to increase, despite the high costs of litigation. Competition between public and private sectors may result in lawsuits -- challenges by public campuses, for example, to the eligibility of certain church-affiliated private campuses for state assistance. (The premise of such challenges is only partially sound; it is far from clear in states like New York, New Jersey, Pennsylvania and Maryland, that a reduction in the number of eligibile private colleges would increase support for the public institutions. Yet administrators in the public sectors cannot be blamed for looking longingly at the millions newly channeled to once proudly "independent" colleges. In these and other sectors the financial pinch is

almost certain to force into the courts many conflicts over resource allocation that are more properly political -- thus reaffirming de Tocquieville's comment that almost all political controversies in the United States eventually wind up in the courts.

5. As state aid to independent colleges and universities increases, the constitutional distinction between "public" and "private" higher education will diminish.

Governmental subvention of private higher education is almost certain to increase until it becomes universal. Even in California, where the state constitution purports to forbid any aid to private schools, nearly 90% of the state scholarship funds go to private campuses enrolling about 12% of the students in the state, and the private medical schools are now eligible for very generous per-student stipends. Across the country, the plight of the private sector combines with its latent political power to make rising public support virtually inevitable. Acceptance of public funds will, however, carry a certain price -- the loss of the constitutional autonomy long enjoyed by the non-tax supported colleges and universities.

Historically the courts have held that private institutions were beyond the reach of the Fourteenth Amendment (and the Bill of Rights) because those guarantees applied only to "state action". As late as 1968, federal courts reaffirmed that principle in declining to hear student suits for reinstatement brought against such large and important but technically private institutions as Denver and Columbia -- despite, in the latter case, the receipt of over $10 million per year from federal, state and city governments and extensive control (unique to New York) by the state Board of Regents. Since then the

tide has begun to turn, in recognition of the essentially "public" character of some "private" universities; their acceptance of substantial public benefits, both tangible and intangible; and the extent of governmental regulation of private higher education. Thus, tiny Wagner College on Staten Island was held potentially subject to the Constitution because state law required it to file student conduct rules in Albany as a condition of eligibility for state aid. A similar decision was reached with regard to Hoftstra University, with the court stressing the receipt of state and federal funds for land acquisition and building construction, among other purposes. Outside New York state, however, the law has still changed little.

The case has not yet arisen that will squarely test the issue. Answers might have been provided had Professor Bruce Franklin filed his reinstatement case against Stanford University in federal rather than state court. In a federal forum, some "state action" would have had to be shown before any constitutional claims could be heard. Stanford would be the perfect vehicle for a test case. Though formally private and primarily supported by non-public funds, with a self-perpetuating governing board, Stanford draws life from a special section of the California Constitution, is one of the largest academic recipients of federal research and development funds, has its own Zip Code, its own police and fire departments, operates the city hospital, and even runs a kind of "company town" in which many of the faculty reside. A quarter century ago the Supreme Court held certain constitutional guarantees applicable to a small company town despite its exclusively corporate ownership and management. Since that time other cases have suggested that private action which becomes heavily interdependent with government, or which exercises essentially governmental powers, may be subject to constitutional safeguards though private ownership is not divested. Suffice it to say, wherever the major break comes, that

this "double standard" of higher education law will not last forever.

6. The spread of faculty collective bargaining will reduce litigation by faculty but may increase litigation against faculty.

During the last several years, as student disorder has subsided and faculty activism intensified, the professor has increasingly replaced the student as plaintiff in the courts. That trend is likely to continue up to a point. Where collective bargaining takes over, litigation by faculty members may diminish, for two separate reasons. First, the courts have frequently been used for resolution of grievances that would be settled by different channels under a collective bargaining agreement. A lawsuit might still represent a last resort, to be sure, but it would not be the first resort as it is now perceived by instructors to whom no internal grievance machinery is available.

Second, many of the recent faculty suits have been encouraged and even financed by faculty organizations -- NEA, AAUP, and AFT -- that are keenly competing for faculty support on many campuses. When these contests have been decided, the current catalysts will largely disappear. The interest in litigation for faculty rights will not vanish, but substantial diminution seems probable.

On the other hand, collective bargaining may bring more lawsuits against faculty members and organizations. During the early fall of 1972, suits were filed by student groups to enjoin faculty strikes at community colleges in Pittsburgh and Philadelphia. Apparently, in both instances, the filing of the suit hastened a strike settlement, though neither went to a judgment on the merits. Postponed for another day were such intriguing issues as the legal status of a student's claim to an uninterrupted education, and the anomalous role of the administration and the board in a lawsuit ostensibly between

students and faculty. It is too early to tell whether these suits mark a trend; at least they introduced the possibility of asking the courts to force faculties back to the classroom.

7. The high tangible and intangible costs of litigation will tend to deter resort to the courts by all parties, while the impact of each court decision will widen and the prospect of suit will accordingly shape conduct on the campus.

Laymen typically have little appreciation of the enormous costs of going to court. These costs cannot be measured solely in terms of money. One must also take account of the time diverted from other duties, the potential divisiveness of litigation between campus constituencies, and the grave risk of a bad but binding decision from a court unfamiliar with academic life. Any student, faculty member, administrator, or trustee who has been through a major lawsuit appreciates these costs, but the lesson is not well learned vicariously.

As awareness of these tangible and intangible costs spreads throughout the academic community, resort to the courts is likely to diminish -- despite the court-seeking pressures described earlier. Paradoxically, the increasing availability of legal services -- more students' attorneys, faculty union lawyers and local counsel in statewide systems -- will reduce litigation for precisely this reason. The real lawyer knows (as his television counterpart seems not to) that he is paid primarily to stay out of court except where no other avenue of redress exists. Publicity about the expense to Stanford of defending the Franklin suit, or to the University of Minnesota in the McConnell (homosexual librarian) case, or to both sides in recent faculty nonreappointment cases, may serve to spur early settlement.

Meanwhile, the precedential value of each case that does go to court will magnify as people come to realize how costly the judgment is. Moreover, the sharing of information about court decisions becomes progressively better -- not only the Chronicle of Higher Education and several special publications aimed at college and university attorneys, but new columns or sections on law in many periodicals designed for the non-lawyer administrator. It is true that a little law is sometimes a dangerous thing; but the greater sophistication of the administrator-client usually makes the campus attorney's job easier and more rational.

Finally, the conduct of all parties will increasingly respond to rulings they know (or fear) a court might make if the issue were adjudicated. Once it is clear that being sued carries risks even if a favorable decision is assured -- as it hardly ever is in real like -- then the avoidance mechanism becomes increasingly powerful. A threat of suit, if it is sincere, may be as effective as the actual filing of suit. That would not have been the case ten or probably even five years ago, when academic administrators either believed they could not be sued or would in any event be vindicated.

This set of speculations is far too superficial for a lawyer, even one who is trying to generalize as he looks at the future. Yet it is the best that time permits. The picture that emerges is quite mixed. There is some cause for optimism here, and some cause for pessimism. There are certain variables in this picture that can be controlled to a degree, with probably impact on the trends projected here. Suffice it for the moment to say that these years ahead will not be easy ones, nor will the legal innocense of the pre-1967 era ever return to campus, however tranquil the students may be.